



Transportation
Security
Administration

September 23, 2019

3600.1

Case Number: 2019-TSFO-00645

Sai
MuckRock News
DEPT MR 79158
411A Highland Ave
Somerville, MA 02144-2516

Dear Sai:

The Transportation Security Administration (TSA) is in receipt of your Freedom of Information Act (FOIA) request, dated August 22, 2019 in which you requested the following records:

A. Quiet Skies documents

1. Pekoske's testimony

a. the documents referenced by Pekoske in the statements:

- i. "On the Quiet Skies program. This program is not a new program, but it is an intelligence driven, risked-based rules program that's been in place since 2011. Privacy Impact Statements have been filed and updated..."
- ii. "Sir, the Quiet Skies program is not a new program. It's been in existence since about 2011, 2012."
- iii. "Those records are retained for 2 years."
- iv. "This program is part of a Privacy Impact Assessment that's been published on the DHS website for years, and we do use the Travel Vetting System that Customs and Border Protection employs."
- v. "importantly it is not a new program either. Quiet Skies has been around since 2012. The Privacy Impact Statements have been published and you know that information is out there available to the public to see;

In particular, this means: the documents, dated 2011 or 2012, state the initiation of the Quiet Skies Program; the Privacy Impact [Assessments] that cover the Quiet Skies program, and were published prior to DHS/TSA PIA-018(i) (2019), i.e. "years" ago.

For the PIA portion of this subrequest, rather than providing the entire responsive PIA, you are to provide *only* the portion(s) of the PIA(s) which Pekoske referenced in his testimony.

b. the evidence underlying Pekoske's statements:

- i. "there is, I assure you, strong oversight of this program by the Department. I am confident that it has reduced risk for nearly 7 years."
- ii. "Quiet Skies is a intelligence-based risk assessment program, sir, that's operated by rules. And so the rule set that's reviewed continuously, and changes to those rules can only be approved by myself or my deputy."
- iii. "The data is stored in our Intelligence Officer and our intelligence professionals have access to that information."
- iv. "We, by our rules, want to see a certain number of encounters before they're removed from that program."
- v. "I would say that it's a rules-based program that assesses risk."
- vi. "People who are selected for Quiet Skies based on patterns of travel, in our view, informed by intelligence, represent more risk than other passengers do."
- vii. "We take into consideration a traveler's record."
- viii. "We do not take into consideration a traveler's race or religion."
- ix. "it would be a combination of the name and other criteria."
- x. "Department of Justice may, in certain circumstances [participate in Quiet Skies], but it wouldn't be based just on Quiet Skies."
- xi. "[Approximately how many people has TSA monitored so far under the program?] I'd be happy to provide them to you for the record, because we do record those numbers."
- xii. "I don't believe anybody has been arrested or prosecuted. However, people that are in the Quiet Skies program have eventually been determined to be part of a larger Selectee pool based on what the Quiet Skies program..."
- xii. "there's no particular plot that's been foiled as a result"
- xiii. "there is evidence that it has transitioned some passengers identified in Quiet Skies to the Known or Suspected Terrorists List. Significant numbers."
- xiv. "It doesn't surveil the general public."
- xv. "It surveil and puts Air Marshals on flights of people that we think present more risk in flight."
- xvi. "It's a risk based program consistent with all the law and direction that we've received from the Congress"
- xvii. "it's a very beneficial intelligence driven risk based program that results in better utilization of the Federal Air Marshal Service"

c. in relation to either of the two hearings, whether before or after either hearing, Pekoske's:

- i. notes
- ii. briefings
- iii. communications with any Executive or Legislative Branch members or staff

d. in relation to the letters of Sens. Markey, Nelson, & McCaskill, and of Reps. Biggs, Lynch, & Gowdy:

- i. the letters
- ii. all related correspondence between any DHS employee and any Legislative Branch member or staff (e.g. responses, follow-ups, etc)

- iii. all related correspondence within DHS
- iv. all related correspondence between any DHS employee and any Executive Branch member or staff
- v. all records responsive to the requests made in each of the letters, or that would address the questions asked in those letters

2. All emails

- i. with the phrase "Quiet Skies" or "Silent Partner" in any part of the email, including attachments
- ii. to or from

A. any TSA Administrator or Assistant Administrator, including previous or acting ones

B. TSA Contact Center

C. TSA Office of Legislative Affairs

D. TSA Office of Strategic Communications & Public Affairs

E. TSA Office of Chief Counsel

F. TSA Office of the Executive Secretariat

G. TSA Office of Civil Rights & Civil Liberties

- iii. from January 1, 2010 to the date you conduct the search.

3. DHS/TSA PIA-018(c) and DHS/TSA PIA-018(d)

4. All training materials related to Quiet Skies or Silent Partner.

5. All correspondence related to the identified FOIA requests above, including all provisions of requests parts B and C below as applied to them, and all records responsive to each of those requests.

In addition to the records specified in the request-specific section above, I also request:

B. all records relating to the fulfillment of this request, such as FOIA logs, documentation of searches, referral emails, etc.

C. all records relating to any complaint(s), FOIA request(s)/appeal(s), and/or Privacy Act request(s)/appeal(s) made by me. This includes, but is not limited to: 1. all records relating to the processing my previous requests, complaints, etc; 2. all records containing the terms my name, email address(es), and other contact or identifying information, listed below my signature; and 3. all records containing any of my complaint, request or appeal identifiers.

For all responsive records, I also request:

D.

1. all parts of the record (i.e. no portion of a record with some responsive portion may be considered "non-responsive"); 2. all versions of the record, whether or not currently in use; 3. all record metadata, such as dates on which they were drafted, passed, went into effect, withdrawn, or similar events; person(s) / office(s) responsible; authors; IDs; revision numbers; etc.; 4. a detailed index of all claims of exemption/privilege, regardless of whether the record is claimed to be exempt in whole or in part; access to inspect the record directly, in its native electronic format; and 5. if any classification applies, mandatory declassification review (MDR) under E.O. 13526, and the result of the MDR, including any declassified records.

TSA's Response

What follows is a summary of TSA's determinations regarding your request for records and your request for a fee waiver.

Determination Regarding Request for Records

Regarding Item A 1(a), a search for records will be conducted for documents, dated 2011 or 2012, that memorialize the initiation of the Quiet Skies Program and Privacy Impact Assessments pre-dating DHS/TSA PIA-018(i) that cover the Quiet Skies program. You will be notified if any additional information is needed in order to conduct a search for records.

With respect to your statement, "For the PIA portion of this sub-request, rather than providing the entire responsive PIA, you are to provide *only* the portion(s) of the PIA(s) which Pekoske referenced in his testimony," please note that the FOIA does not require agencies to create new records, conduct research, or analyze data when responding to requests, and this request necessarily requires identifying a record and then consulting an individual to isolate a portion of it. Thus, TSA will not be dividing any responsive records to provide you with specific "portions."

Regarding Item A1(b), this portion of your request is overly broad and does not reasonably describe the records sought so as to allow agency personnel to locate them with a reasonable amount of effort. Simply stating, "the evidence underlying Pekoske's statements" does not sufficiently describe records to enable TSA to conduct a reasonable search. The term "evidence" is broadly construed and does not describe TSA records in a way that could facilitate a search. If you would like TSA to conduct a search, please narrow and clarify the scope of your request by providing the specific type of records you are seeking. If we have not heard from you by November 4, 2019, we will administratively close this part of your request.

Regarding Item A1(c), a search for records will be conducted for Administrator Pekoske's notes, briefings, and communications with any Executive or Legislative Branch members or staff in relation to the Administrator's testimony before the Senate Commerce, Science, & Transportation Committee on September 5, 2018, and before the House Oversight & Government Reform Committee on September 26, 2018. You will be notified if any additional information is needed in order to conduct a search for records.

Regarding Item A(1)(d)(i), a search for records will be conducted specifically for the letters from Sen. Markey to David Pekoske, July 30, 2018; Rep. Biggs to David Pekoske, Aug. 1, 2018; and Sens. Nelson & McCaskill to David Pekoske, late Aug. 2018. TSA does not maintain records of correspondence between members of Congress, therefore it will not conduct a search for the letter from Rep. Lynch to Rep. Gowdy, July 30, 2018. With respect to the remaining items under (A)(1)(d), the request is overly broad and does not reasonably describe the records sought so as to allow agency personnel to locate them

with a reasonable amount of effort (*e.g.*, “all related correspondence” and “all records”). If you would like TSA to conduct a search, please narrow the scope of your request by providing specific details about the records you are seeking, to include the specific dates, type of correspondence, subject matter, and individual involved in the correspondence and records. If we have not heard from you by November 4, 2019, we will administratively close this part of your request.

Regarding Items A(1)(d)(iii) and (iv), TSA is not the proper component to respond to these sub-items; therefore TSA is referring this portion of your request to DHS for direct reply to you.

Regarding Item A(2), this portion of your request is overly broad and does not reasonably describe the records sought so as to allow agency personnel to locate them with a reasonable amount of effort. Although you have provided a timeframe, a list of offices, and the phrases “Quiet Skies” and “Silent Partner,” your request for “All emails” within those parameters is not susceptible to a reasonable search. As framed, your request would require hundreds of employees (including former employees, if available) in the named offices to independently conduct a search of their email dating back to 2010, and thus would not constitute a reasonable search. If you would like TSA to conduct a search, please narrow the scope of your request by providing a discrete category of records that would be susceptible to a reasonable search, to include a narrower timeframe, a clearly defined subject, and the individual(s) that the emails were to or from. If we have not heard from you by November 4, 2019, we will administratively close this part of your request.

Regarding Item A(3), TSA will conduct a search for records. You will be notified if any additional information is needed in order to conduct a search for records.

Regarding Item A(4), this portion of your request is overly broad and does not reasonably describe the records sought so as to allow agency personnel to locate them with a reasonable amount of effort. “All training materials related to Quiet skies or Silent Partner” does not provide a sufficient description to facilitate a reasonable search. If you would like TSA to conduct a search, please narrow the scope of your request by providing a description of records that would be susceptible to a reasonable search, to include the specific type of training, the specific type of employee that the training is for, and a specific timeframe, or the particular issues that are addressed by the training materials. If we have not heard from you by November 4, 2019, we will administratively close this part of your request.

Regarding Item A(5), this portion of your request is overly broad and does not reasonably describe the records sought so as to allow agency personnel to locate them with a reasonable amount of effort. “All correspondence related to the identified FOIA requests above” does not provide sufficient detail to facilitate a reasonable search. Please specify the type of correspondence you are seeking, including a specific timeframe, clearly defined subject, and the individual(s) that the correspondence was to or from. Also, with respect to the portion of your request “including all provisions of requests parts B and C below as applied to them, and all records responsive to each of those requests,” please see the responses directly below.

Regarding Item B, all records relating to the fulfillment of this request, such as FOIA logs, documentation of searches, referral, emails, etc., per the FOIA, an agency is only required to search for responsive records in their possession and control at the time a search is conducted. If you would like TSA to conduct a search, please provide additional information to reasonably describe what records you are seeking that the agency has in its possession at the time a search is conducted. If we have not heard from you by November 4, 2019, we will administratively close this part of your request

Regarding “Item C and all sub-items thereunder, all records relating to any complaint(s), FOIA request(s)/appeal(s), and/or Privacy Act request(s)/appeal(s) made by you.” You have made this request

before, and it is being processed under TSA FOIA 2015-TSFO-00336. To the extent you are requesting additional records, please identify dates, locations, case numbers, or other specific criteria that will enable TSA to conduct a search. In its current form, this portion of your request is not reasonably described so as to enable agency personnel to locate them with a reasonable amount of effort. Please provide additional information, as noted above, to clarify this portion of the request as soon as possible and no later than 30 working days from the date of this letter. If we have not heard from you by November 4, 2019 we will administratively close this part of your request.

With respect to “Item D, sub-items 1, 2 and 5”, any records responsive to those portions of your request that are reasonably described will be processed in the manner prescribed by the DHS FOIA regulations.

Regarding “Item D, sub-item 3, and any other portions of your request for “All record metadata” these portions of your request are overly broad and do not reasonably describe the records sought as to allow agency personnel to locate them with a reasonable amount of effort. The request as outlined would encompass millions of records and likely terabytes of data. Furthermore, agencies are required to provide a responsive record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.¹ This means that FOIA requests must be processed in a requested format if the capability exists to respond to the request in that format. The TSA FOIA office uses a DHS web-based application to manage the FOIA process that includes the processing and production of responsive records. This system processes all records in a PDF format. Therefore, the records are only reproducible by TSA in a PDF format. As a result of the records being converted to a PDF, the file and file system data or metadata from the raw format of the records processed are not available. Thus, TSA will be unable to produce records responsive to this portion of your request in the manner you seek, even if it were reasonably described

Also, with respect to “Item D, sub-item 4, “A detailed index of all claims of exemption,” you have requested that TSA provide a *Vaughn* Index. With regard to the timing of the creation of a *Vaughn* Index, it is well settled that a requester is not entitled to receive one during the administrative process. Accordingly, I am denying this portion of your request.

Determination Regarding Fees

Provisions of the Act allow us to recover part of the cost of complying with your request. You indicated in your letter that you are not willing to pay fees for the processing of this request, but may be willing to pay if it is necessary. We shall charge you for records in accordance with the DHS FOIA regulations as they apply to all other requestors. You will receive the first 100 pages at no charge. In the event that responsive records exceed 100 pages, you will be notified and we will then provide you with a fee estimate for those portions of your request that are reasonably described. Any further work on your request will not continue until you commit, in writing, to pay the estimated fee amount, another agreed upon designated fee amount or if necessary, modify the portion of your request that is reasonably described.

As it relates to your fee waiver request, I have reviewed your letter and have determined that you have not presented a convincing argument that you are entitled to a blanket waiver of fees.

Per DHS FOIA Regulations, 6 CFR § 5.11(k), a component may reduce or waive fees when it is determined, (i) disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and

¹ 5 U.S.C. § 552(a)(J)(B).

(ii) disclosure of the information is not primarily in the commercial interest of the requester.

To determine whether the first fee waiver requirement is met, components will consider the following factors:

- (i) The subject of the request: Whether the subject of the requested records concerns “the operations or activities of the government.” The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.
- (ii) The informative value of the information to be disclosed: Whether the disclosure is “likely to contribute” to an understanding of government operations or activities.
- (iii) The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to “public understanding.”
- (iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

To determine whether the second fee waiver requirement is met, components will consider the following factors:

- (i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure.
- (ii) The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.”

As a requester, you bear the burden under the FOIA of showing that the fee waiver requirements have been met.

Based on my review of your August 22, 2019, request and for the reasons stated herein, I have determined that your fee waiver request is deficient because your request for a fee waiver has failed to meet all factors per DHS FOIA Regulations, 6 CFR § 5.11(k) as required. Specifically, for the items you requested, you failed to detail with any specificity the informative value of the information being requested; how it will be likely to contribute to an understanding of government operations or activities; how it will contribute to public understanding, or how it will contribute significantly to public understanding of government operations or activities. Also, your intent to share this info with the media does not entitle you to a public interest fee waiver.

Furthermore, your request to be recognized as “a representative of the news media” for the purpose of assessing fees is also denied for failure to meet the statutory definition of “a representative of the news media” in the OPEN Government Act of 2007. Per the OPEN Government Act of 2007, a “representative of the news media” is defined as “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience; defining “news” as “information that is about current events or that would be of current interest to the public.”

You stated in your request, "I intend and am able to host and publish all received records online to the general public at no charge, as well to publish highlights, analyses, summaries, commentaries, and other creative, original journalistic and scientific work about responsive records through multiple online publications, as part of Fiat Fiendum's work."

I have reviewed your internet sites and they do not show that you have "turned the raw materials into distinct work," only that you have posted documents received via your FOIA requests. Merely making the information received available to the public (or others) fails to meet the statutory definition of a representative of the news media nor is it likely to contribute significantly to public understanding of the operations or activities of the government. Furthermore, you have failed to provide any definitive examples of your "journalistic publications" or any commentary or analysis; and your intentions to do so are not enough. Simply being the publisher of a website is not sufficient for you to qualify for a journalistic fee waiver. Any personal benefit derived by you is not a consideration entitling you to a fee waiver. Also, agencies take into account the identity and qualifications of the requester in order to determine whether the public would benefit from disclosure to that requester. The majority of materials you have made available constitute otherwise unpublished academic work and essays as well as records obtained through FOIA requests. Furthermore, to the extent that any of your postings may have been picked-up and referenced by recognized news media outlets, such action on their part does not enhance your claim to be "a representative of the news media."

Should you decide to file an appeal, it should be mailed to:

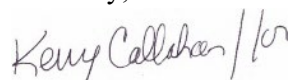
Christine Griggs
FOIA Appeals Officer
Office of Civil Rights & Liberties, Ombudsman and Traveler Engagement (CRL/OTE)
Transportation Security Administration
701 South 12th Street, West Building, TSA-33
Arlington, VA 20598-6033

Your appeal **must be submitted within 90 days** from the date of this determination. It should contain your FOIA request number and, to the extent possible, the reasons why you believe the initial determination should be reversed. In addition, the envelope should be prominently marked "FOIA Appeal." Please note that the TSA FOIA Appeals Officer's determination of the appeal will be administratively final.

Additionally, you have the right to seek dispute resolution services from the Office of Government Information Services (OGIS) which mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. You may contact OGIS as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5796.

Your request has been assigned reference number **2019-TSFO-00645**. Please refer to this identifier in any future correspondence. If you have any questions, or would like to discuss this matter, please feel free to contact this office at 866-364-2872.

Sincerely,



Teri M. Miller
FOIA Officer